IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, et al.	§	
	§	
Plaintiffs,	§	**CIVIL ACTION NO. H-01-CV-3624**
	§	**AND CONSOLIDATED CASES**
vs.	§	
	§	
ENRON CORP., an Oregon corporation, et al.	§	
	§	
Defendants.	§	
PAMELA M. TITTLE, on behalf of herself and a class of persons similarly situated, *et al.*,	§	
	§	
Plaintiffs,	§	**CIVIL ACTION NO. H-01-3913**
	§	**AND CONSOLIDATED CASES**
v.	§	
	§	
ENRON CORP., an Oregon Corporation, *et al.*,	§	

DEFENDANT ANDREW S. FASTOW'S MOTION FOR LEAVE OF COURT TO FILE REPLY AND REPLY IN SUPPORT OF MOTION FOR POSTPONEMENT OF DISCOVERY

Defendant Andrew S. Fastow respectfully moves for leave of Court to file a Reply in Support of his Motion for Postponement of Discovery, and if leave is granted, would file the following Reply:

I. The Law Supports a Postponement of Discovery as to Fastow to Protect his Constitutional Rights.

The *Tittle* Plaintiffs, the *Newby* Lead Plaintiff, and one Defendant filed Oppositions to Fastow's request to postpone discovery. Because this issue impacts Fastow's rights under the United States Constitution, he asks for leave to file a Reply in support of his request for a postponement.

Both Plaintiffs mischaracterize several Supreme Court and Fifth Circuit cases in a disingenuous attempt to argue that a civil defendant cannot obtain a postponement of discovery during the pendency of a criminal investigation. Yet they offer no law that distinguishes or contradicts the two controlling decisions on point: the Fifth Circuit's opinion in *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084 (5th Cir. 1979) and this Court's decision in *Kmart v. Aronds*, No. H-96-1212 (S.D. Tex. Dec. 12, 1996).

Failing on that point, the Lead Plaintiff, the *Tittle* Plaintiffs, and Defendant Harrison then argue that the balance of interests weighs against a postponement of discovery. Unwilling (or unable) to comprehend the danger the criminal prosecution presents to Fastow – the *Newby* Lead Plaintiff describes Fastow's potential loss of his Fifth Amendment or Due Process Right a "purported inconvenience" – Plaintiffs attempt to diminish his dilemma because they cannot offer concrete examples of prejudice to themselves to outweigh the certain prejudice to Fastow.

Plaintiffs argue they will suffer prejudice from a delay in the trial of this case, even though Fastow has not sought any change in the trial setting. Speculation of delay does not counterbalance the severe prejudice to Fastow in the absence of a stay: evisceration of his defense in this civil case when Plaintiffs seek an instruction that the jury may draw an adverse inference against Fastow based on his invocation of the Fifth Amendment privilege against self-incrimination. Each Opposition relies upon the need to obtain discovery from Fastow while ignoring that when he, in all likelihood, asserts his Fifth Amendment privilege, they will not obtain the discovery in any event. What quickly becomes apparent is that none of the opponents care as much about the discovery, as they do about using the fortuity of a pending criminal investigation to obtain the advantage of an adverse inference against Fastow. This demonstrates gamesmanship by Plaintiffs, not prejudice to them.

II. Argument

Fastow's Reply deals with the arguments raised in each Opposition. The Reply responds first to the *Tittle* arguments, as the *Tittle* Plaintiffs served the discovery that Fastow seeks to stay,

and then to the arguments in the *Newby* Lead Plaintiff's Opposition and finally to those in the Opposition filed by Ken Harrison. Because the Reply endeavors to avoid repetition, Fastow offers a joint reply to certain arguments common to the *Tittle* and *Newby* Oppositions.

A. The *Tittle* Plaintiffs Misstate A Variety of Legal Principles Relevant to the Motion.

In their Opposition, the *Tittle* Plaintiffs misstate several legal principles to avoid a postponement. The decisions cited by the *Tittle* Plaintiffs actually undercut their position and support a postponement.

1. Forcing Fastow to answer discovery impacts his constitutional rights.

The *Tittle* Plaintiffs first argue that because courts at times have permitted adverse inferences to be drawn against civil defendants for asserting the Fifth Amendment privilege, the drawing of that inference "is of no constitutional moment." *Tittle* Plaintiffs' Opposition, at 4 [*hereinafter Tittle* Opp.]. They claim that "The United States Supreme Court, and the Fifth Circuit, have rejected the central premise of Fastow's argument – that he should not be forced to choose between responding to discovery requests (and potentially providing fodder for criminal investigations), or invoking the Fifth Amendment and facing an adverse inference in the *Tittle* case." *Id.* How Plaintiffs could make that incorrect assertion in a Brief that cites this Court's *Kmart* and the Fifth Circuit's *Wehling* opinions, both of which contradict the argument, is hard to fathom. The *Tittle* Plaintiffs' argument is incorrect as a matter of law and rests on a flawed premise and an incorrect reading of the only two cases cited in support of it.

The two cases Plaintiffs cite for this proposition – *Baxter v. Palantino*, 425 U.S. 308, 318 (1976) and *Curtis v. M & S Petroleum, Inc.*, 174 F.3d 661, 675 (5th Cir. 1999) stand for the the central proposition in Fastow's argument: that if a party to a civil suit invokes his Fifth Amendment right under the United States Constitution, the Court in that proceeding may instruct

the jury to draw an adverse inference from that invocation of the Fifth Amendment. It is that potential, in fact, that presents Fastow with the dilemma of losing either his Due Process right to present his defense or his right not to testify if the evidence might be used to incriminate him. Neither of the cases says that a civil plaintiff may move forward with discovery during a criminal investigation, thus obtaining a series of Fifth Amendment invocations, which the plaintiffs may then use to their advantage later in the lawsuit. The only time the Fifth Circuit has spoken to the issue, it has held that staying civil proceedings for as long as three years during a pending criminal investigation was proper. *See Wehling*, 608 F.2d at 1089. This Court applied *Wehling* to grant a stay in *Kmart v. Aronds*.

2. Fastow's prior invocation of the Fifth Amendment before the U.S. Congress does not give rise to any adverse inference that could be drawn by the factfinder in this action.

Second, plaintiffs argue that a stay would make no difference to Fastow. They baldly assert the right to draw an adverse inference in this action from Fastow's assertion of the Fifth Amendment privilege before Congress, without citing any cases that permit federal district courts to draw such an inference from invocation of the Fifth Amendment privilege before a coordinate branch of government, i.e. the Congress. In fact, the law permits an adverse inference only when a defendant has invoked the Fifth Amendment *in civil proceedings*. *See Curtis*, 173 F.3d at 673-74 (Defendant's refusal to testify "*during civil proceedings* on the grounds that his testimony might incriminate him . . . may be used against him in a civil suit.").

Lacking any authority to support their view, Plaintiffs resort to mischaracterizing the cases they do have, stating, "In any event, Fastow has ***already*** refused to answer questions on Fifth Amendment grounds before Congress – and Plaintiffs are thus ***already*** entitled to an adverse inference charge under the Fifth Circuit's decision in *Curtis*, 174 F.3d at 675." *Tittle*

Opposition at 4 (emphasis in original). This is wrong. In *Curtis*, the court held that it was permissible to permit an adverse inference when a corporate executive invoked the Fifth Amendment in a deposition *in the same proceeding*. Nothing in *Curtis* indicates that the Fifth Circuit held or would hold that invocation of the Fifth Amendment in testimony before one branch of government would justify or permit an adverse inference by this Court, a separate, coordinate branch of government.

Accordingly, until Fastow asserts the Fifth Amendment in this proceeding, no adverse inference is permitted. That's why Fastow has asked for a stay pending conclusion of the criminal investigation, so that he does not have to face the Hobson's choice between his constitutional right against self-incrimination and his right to defend this lawsuit, which an adverse inference would effectively eviscerate.

3. The Fifth Amendment privilege extends to the production of documents.

The *Tittle* Plaintiffs' third argument proves an uncontested proposition: that the Fifth Amendment does not bar the issuance of document requests. Of course, that is the case. The Fifth Amendment also does not bar a party from asking questions in a deposition. The Constitution instead protects the party to whom the discovery is directed from being compelled to respond. Either purposely or through gross neglect, the *Tittle* Plaintiffs altogether ignore the well-established "act of production" doctrine. *See, e.g.*, *United States v. Hubbell*, 530 U.S. 27, 37-38 (2000); *see Ohio v. Reiner*, 532 U.S. 17, (2001) (Fifth Amendment protection applies to any response that would provide a "link in the chain of evidence" needed to prosecute). That doctrine applies the Fifth Amendment's protection to document requests because of the inherently testimonial nature of document production. *See, e.g.*, *Hubell,* 520 U.S. at 37-38.[1]

[1] The *Tittle* Plaintiffs also argue that there will be no temptation for the government to use

B. Neither the *Newby* Nor the *Tittle* Plaintiffs Establish Any Prejudice From A Stay That Would Outweigh The Indisputable And Non-Speculative Prejudice Faced By Fastow From Denial Of This Motion.

Because Plaintiffs' arguments that Fifth Circuit law does not permit a stay do not withstand close scrutiny, *see infra* Part A, both the *Tittle* Plaintiffs' and the *Newby* Lead Plaintiff's argument boils down to their analysis of the balancing test they contend is necessary to determine if litigation is to be stayed as to any party pending the outcome of a criminal prosecution. That balance weighs in favor of a stay.

1. The presence or absence of indictment has no bearing on the availability or merits of a stay in this case.

While conceding that "Fastow may face criminal liability for the same conduct as that at issue in their case," the *Tittle* Plaintiffs note the obvious fact that he has not yet been indicted and, on that basis, claim that he has no right to a discovery postponement. *Tittle* Opp. at 6-7. A party who faces potential indictment and who is under criminal investigation has as large an interest in being protected from compelled discovery as a party who has been indicted. If the party being investigated by the prosecutor is not ultimately indicted, then no chance for conviction and loss of freedom exists. So while a distinction exists between pre-indictment and

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discovery in this case for use in its investigation of Fastow because the grand jury has "broad" subpoena power prior to indictment. *Tittle* Opp. at 5. Plaintiffs' argument misses the point. The point is that, if discovery responses (be they testimony or documents) are available for the government to obtain even informally in watching the developments of this case, the government can access that discovery for use in its investigation without going through the carefully circumscribed and appropriate channels for investigation in the absence of access to such discovery. Moreover, the prosecutor learns from the civil discovery not only what issues to pursue and what issues may not be productive, but also how best to construct its discovery and its case for the grand jury. Proof of this overlap can be seen in the document request the *Newby* Lead Plaintiff directed to Fastow asking for all documents produced to the governmental agencies investigating Enron: "Request No. 1: All documents and all communications you produced to the SEC, DOJ, FBI, the US Congress (including any committee or subcommittee thereof), any other federal, state or local executive, legislative, or judicial branch of government, or any investigatory or law enforcement agency or bureau, concerning Enron."

post-indictment discovery, it does not diminish the importance of protecting a party under government investigation from compelled discovery, a fact this court recognized in *Kmart Corp. v. Aronds*, Civ. No. H-96-1212 (S.D. Tex. Dec. 11, 1996). In *Kmart*, this Court weighed the interests of a party pre-indictment against the interests of the civil litigants in continuing their case and found that the balance favored staying the civil proceedings until the prosecution finished its work. Similarly, the Fifth Circuit case that establishes a civil defendant's right to a stay, *Wehling v. Columbia Broadcasting System*, also involved a stay of discovery against an unindicted party subject to criminal investigation. *See* 608 F.2d at 1085.

2. Contrary to the *Newby* Lead Plaintiff's Assertion, A Stay as to Fastow Will Not Impede The Development of This Case.

According to the *Newby* Lead Plaintiff "[n]otwithstanding Mr. Fastow's apparent intent to assert his Fifth Amendment privilege in response to incriminating questions, Mr. Fastow can provide evidence that will not implicate him but will nonetheless be critical to Lead Plaintiff's development of this case." *Newby* Plaintiffs' Opposition, at 4 [*hereinafter* "*Newby* Opp."]. Discovering this information without delay is important, according to the *Newby* Lead Plaintiff, because "Mr. Fastow's recollection of these events [will] continue to fade if discovery is postponed," because "[w]itnesses and documents known solely to Mr. Fastow may relocate or be lost," and because "[a] stay would also exacerbate difficulties in proving this case due to intentionally destroyed evidence." *Id.*

The *Newby* Lead Plaintiff's argument fails for several reasons. First, to the extent that the *Newby* Lead Plaintiff seeks discovery concerning the transactions at the heart of this case and also apparently at the heart of the Government's criminal investigation, discovery against Fastow is not likely to lead to any relevant information at this time because of the need to assert the Fifth Amendment privilege. Such discovery, therefore, would only undermine Fastow's ability to defend himself in this Court by creating a series of invocations of the Fifth Amendment, which the Lead Plaintiff would seek to use against Fastow at trial. *Ohio v. Reiner*, 532 U.S. 17, 20-21

(2001) (privilege against self-incrimination may be asserted by innocent where a witness's answers could reasonably furnish a link in the chain of evidence against him).

Second, the *Newby* Lead Plaintiff argues that the stay will prejudice it because memories about relevant events will fade over time. There is no reason to believe Fastow's memories will fade in any significant manner over the course of such a stay. Moreover, as the court explained in *Trustees of the Plumbers & Pipefitters National Pension Fund*, even though plaintiffs may have a legitimate interest in speedy resolutions of matters and avoiding possible "loss of evidence" during a stay, "[t]hese interests are trumped by defendants' interests in avoiding the quandary of choosing between waiving their Fifth Amendment rights or effectively forfeiting the civil case." 886 F. Supp. at 1140. *See also Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1088 (5th Cir. 1979) ("[T]he [Supreme] Court has emphasized that a party claiming the Fifth Amendment privilege should suffer no penalty for his silence.").

Third, the *Newby* Lead Plaintiff mistakenly suggests that "[w]itnesses and documents known solely to Mr. Fastow may relocate or be lost." *Newby* Opp. at 4. Given the complex nature of the transactions and the number of parties allegedly involved, it is unlikely that there are any witnesses or documents known only to Fastow, nor has the *Newby* Lead Plaintiff identified any such witnesses or documents. No reason exists to believe that any witnesses or documents are likely to relocate. The *Newby* Lead Plaintiff's supposition to the contrary is speculation.

Fourth, to the extent the *Newby* Lead Plaintiff and *Tittle* Plaintiffs assert that Fastow controls particular evidence unavailable elsewhere, they are correct only with respect to this testimonial evidence which would not be available in any event upon assertion of a Fifth Amendment privilege. Documents central to the plaintiffs' claims will, as a practical matter, be in possession of the business entities, such as Enron and the LJM partnerships, not the individuals.

Lastly, the *Newby* Lead Plaintiff has no basis to assert that "[a] stay would also exacerbate difficulties in proving this case due to intentionally destroyed evidence." *Newby*

Opp. at 5. That Arthur Anderson shredded documents does not mean that other people are likely to shred documents or otherwise attempt to obstruct justice. Plaintiff's speculation and baseless accusations are not persuasive.

3. A Stay Would Not Inhibit the *Newby* Lead Plaintiff's Ability To Identify Other Defendants.

According to the *Newby* Lead Plaintiff, it "need[s] discovery from Mr. Fastow to identify other culpable parties." *Newby* Opp. at 5. The *Newby* Lead Plaintiff argues that "[s]taying discovery against Mr. Fastow increases the likelihood that other offenders may escape liability" under the statute of limitations. *Id.*

As an initial matter, both the *Tittle and Newby* Plaintiffs have sued virtually anyone who ever came in contact with Enron during the relevant time period, from its senior and mid-level executives and officers to its accountants, banks and lawyers. It is hard to believe there could be any additional defendants that have not already been named as defendants in this "sue them all, sort them out later" complaint.

Even if there existed some potential defendant out there whom the *Newby* Lead Plaintiff has not yet sued, Plaintiff has offered no reason to believe Fastow is the sole source of that person's or entity's identity or that the *Newby* Lead Plaintiff will need to depose Fastow to identify such a person. Instead, the many individuals allegedly involved in the transactions at issue in this presumably could provide the sought-after information. Moreover, given that the criminal investigation of Fastow and these transactions will likely result in his assertion of his Fifth Amendment privilege in response to discovery, there is no reason to believe that deposing Fastow now would do anything to help identify potentially culpable parties.

4. There Is No Reason To Assume That The Stay Fastow Requests Will Delay Final Resolution Of This Case Or Increase The Risk Of Multiple Adjudications.

According to the *Newby* Lead Plaintiff and *Tittle* Plaintiffs, the Court should deny Fastow's motion because "[i]t is difficult to conceive how a trial could proceed against Mr.

Fastow by December 2003 if the stay he seeks were granted. Thus, Mr. Fastow's stay would delay final resolution of this case until well after December 2003 and multiple adjudication here would likely occur." *Newby* Opp. at 7; *Tittle* Opp., at 8.

The plaintiffs' assertion that the stay Fastow requests will require a delay in the trial date is speculation. Neither the plaintiffs nor Fastow have any idea how quickly the government's criminal investigation will progress. If, however, the government's case against Arthur Anderson is any indication, it would appear the government is working with more than deliberate speed in its criminal investigation.[2]

Because Fastow is not asking the Court to move the trial date (*see* Opening Br. at 9 FN 8) and because the Court will address that issue later (should the need arise), there is no reason to speculate about how such a delay might impact the plaintiffs' cases. Nor is there any reason to assume that the stay Fastow requests will lead to multiple adjudications. The plaintiffs' interest, if any, in avoiding such speculative harm cannot outweigh the immediate and serious harm Fastow would suffer were the Court to deny his motion.

Further speculating about possible sources of delay, the *Tittle* Plaintiffs argue that, if this Court grants a postponement of discovery as to Fastow alone, other defendants will seek the same relief. Apparently the *Tittle* Plaintiffs believe that the same individuals who declined to take the Fifth Amendment before Congress and in deposition will now do so to avoid answering the *Tittle* Plaintiffs' discovery. Perhaps the *Tittle* Plaintiffs give themselves too much credit.

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[2] The Lead Plaintiff's cite to *Sterling National Bank v. A-1 Hotels International, Inc.*, 175 F. Supp. 2d 573 (S.D.N.Y. 2001), does not lend support for the notion that a stay in this case is inappropriate. In *Sterling*, the court's analysis of the prejudices resulting from stay relied in great part on the fact that the only discovery remaining to be completed in that case was the discovery as to which a stay had been sought – all other discovery was complete and the case was otherwise ready for trial. *Id.* at 579. In this case, in contrast, there is an enormous amount of discovery that can proceed during the course of the requested stay. Similarly, Lead Plaintiff's cite to *Hines v. D'Artois*, 531 F.2d 726, 737 (5th Cir. 1976) is inapposite – that case did not concern a motion to stay based on the Hobson's choice of asserting the Fifth Amendment privilege in a civil case. Instead, it concerned whether a civil discrimination lawsuit should be stayed pending EEOC action.

There is no sign that any defendant will change his or her position with respect to whether to assert Fifth Amendment protection based on response to the *Tittle* Plaintiffs' discovery: none has done so.

Apparently not embarrassed to take contradictory positions, the *Tittle* Plaintiffs then counter their own argument to the effect that other persons will copy Fastow and assert their Fifth Amendment privilege by pointing to the absence of other motions by other defendants who have invoked their Fifth Amendment rights as evidence that Fastow's claim must be lacking in merit or others would have tried the same tactic. *Tittle* Opp. at 6-7. Obviously, each party in a civil lawsuit has his or her own plan about what serves his or her best interests. Some other defendants, for their own reasons, have chosen in some cases to speak under oath, or respond to discovery, even if they previously invoked the Fifth Amendment. Fastow has instead availed himself of the protection accorded him by the U.S. Constitution. The fact that other individuals have not availed themselves of that protection has no bearing on the merits of the relief sought by Fastow.

5. There Is No Reason To Believe That A Stay Would Prevent The *Newby* Lead Plaintiff From Collecting On A Judgment.

According to the *Newby* Lead Plaintiff, the Court should deny Fastow's motion because *if* the stay is granted, and *if* the Court later decides it needs to move the trial date, the *Newby* Lead Plaintiff *might* have more trouble collecting the "*potentially* limited funds that may satisfy the enormous damages" *Newby* Lead Plaintiff intends to claim. *Newby* Opp. at 7 (emphasis added).

The *Newby* Lead Plaintiff's argument relies on a string of suppositions and possibilities that may or may not occur. Again, Fastow is *not* asking the Court to move the trial date. Moreover, the Lead Plaintiff offers no reason to believe that the funds available to pay any judgment obtained will be consumed by others as a result of the stay.

6. The Public Interest Will Not Be Prejudiced By The Stay Fastow Requests.

a. The Stay Fastow Requests Will Not Undermine Public Confidence In The Judicial System. If Anything, *Denial* Of The Stay Will Undermine Such Confidence.

According to the *Newby* Lead and *Tittle* Plaintiffs, Fastow's motion should be denied because "a significant delay in this litigation due to an indefinite stay of discovery threatens to erode public confidence in the judicial system." *Newby* Opp. at 8; *Tittle* Opp. at 8.

First, as discussed above, there is no reason to assume that the stay Fastow requests will result in *any* delay in this litigation, never mind one that would "erode public confidence in the judicial system." *Id.* If and when someone requests such a continuance of the trial, the Court will decide then what effect moving the trial date will have on public confidence.

Second, it would be a mistake to see public confidence in the judicial system as resting only on the speed of adjudication. There is ***at least*** equal public concern about giving defendants a fair opportunity to enjoy their Constitutional due process rights and not to be prejudiced in exercising their Fifth Amendment privilege. If Fastow's motion is denied, his ability to defend himself, both here and in front of a criminal tribunal, will be greatly compromised. The public's confidence in the judicial system would not be advanced by such a result.

b. Plaintiffs' Argument Is Premised On An Inappropriate And Impermissible Presumption Of Guilt.

The *Newby* Lead Plaintiff urges this Court to deny Fastow's motion, arguing from *Arden Way Assocs. v. Boesky*, 660 F.Supp 1494, 1497 (S.D.N.Y. 1987), that "[t]he plight which he imagines that he is in stems solely from his own activities. Surely it would be anomalous to suspend plaintiffs' rights in these civil litigations because they will deal with Mr. Boesky's misconduct." *Newby* Opp., at 8.

The problem with using *Boesky* as an analogy is that Boesky had acknowledged that he had engaged in insider trading in an action before the SEC at the time he asked for a stay. *See Boesky* 660 F.Supp. at 1495. Fastow, however, has never admitted any such wrongful activity. It is therefore entirely inappropriate for *Newby* Lead Plaintiff to argue that Fastow's Hobson's

choice is of his own making.[3]

C. The Prejudice And Harm Faced By Fastow Absent A Stay Is Very Real And Outweighs The Speculative Harms Claimed By Plaintiffs.

1. The Threat Of Indictment In This Case Does Justify The Stay.

The *Newby* Lead and *Tittle* Plaintiffs argue that Fastow's motion should be denied because the government has not yet indicted Fastow. *See Newby* Opp., at 9; *Tittle* Opp., at 6. According to the *Newby* Lead Plaintiff, the "mere possibility of criminal prosecution is insufficient grounds for staying discovery against Mr. Fastow." *Newby* Opp., at 9.

The plaintiffs misstate the standard. The relevant question is not whether there is an indictment. Instead, as the Fifth Circuit explained in *Wehling*, a stay is the appropriate remedy where the defendant "reasonably apprehends a risk of self-incrimination," "even if the risk of prosecution is remote." 608 F.2d at 1087 n.5. Numerous public reports provide that Fastow is currently a target of a grand jury investigation. *See e.g., Houston Chronicle*, April 2, 2002 at B01, and other articles cited in Fastow's Opening Brief. Indeed, the *Newby* Lead Plaintiff nowhere denies the existence of this investigation, or the concomitant possibility of indictment resulting from that investigation. In circumstances where a reasonable apprehension of a risk of self-incrimination exists, a stay is appropriate. *See, e.g., Kmart v. Arends*, *supra*, (issuing stay for civil defendants not yet under indictment).

Newby Lead Plaintiff also tries, but fails, to distinguish the *Wehling* and *K-Mart* cases from the case at bar. First, *Newby* Lead Plaintiff argues that those cases are inapplicable because they purportedly do not involve "complex litigation" or "public interests calling for expeditions

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[3] The *Tittle* Plaintiffs lead their brief with a similar argument by falsely claiming that Fastow "concedes" he was at the "very heart of the Enron meltdown." However, the only thing cited for this alleged concession is a quote taken from the plaintiffs' complaint. This amateurish game of quoting their own allegations does not establish any such concession by Fastow, but it does emphasize that this is what plaintiffs seek to prove in the pending litigation, and underscores the reasonableness of the requested stay. *Wehling*, 608 F.2d at 1087 n.5 (stay is appropriate remedy where dependant "reasonably apprehends a risk of self-incrimination").

resolution," and they do not involve competition for "limited funds." *Newby* Opp. at 9-10. Assuming *arguendo* that the cited cases are less "complex" than the pending one, there is no special right of plaintiffs in "complex litigation" to force defendants to compromise either their Fifth Amendment privilege or their ability to defend against the "enormous" monetary claims asserted in this case. Similarly, there is no reason to believe that the interests in expeditious resolution and competition for limited funds which plaintiffs claim exist in this case did not exist in those cases.

Second, *Newby* Lead Plaintiff tries to distinguish *Wehling* by arguing that Fastow's interest in a stay is less compelling than the interests of the plaintiff in *Wehling* seeking a stay because "Mr. Fastow does not face the prospect of foregoing a valid cause of action as a plaintiff if he asserts his Fifth Amendment rights." *Newby* Opp. at 10. *Newby* Lead Plaintiff's argument is nonsensical. The Hobson's choice faced by Fastow is no less destructive to his rights because he is a defendant faced with foregoing his defense in a lawsuit seeking from him an enormous amount in monetary damages than it would be if he were a plaintiff seeking to obtain damages from someone else. If anything, it makes the situation more dire for Fastow than the plaintiff in *Wehling*.

Lastly, although *Newby* Lead Plaintiff argues that the *K-Mart* decision is inapplicable because it involved a stay of all discovery (*Newby* Opp., at 10), that fact does not lend any support to the argument that there should not be a more narrow stay of discovery as to Fastow. No logic supports the conclusion that a stay to one defendant is more disruptive than a complete stay; if anything, the logic is that Fastow's requested narrow stay is less intrusive than the complete stay granted in *K-Mart*.

In sum, the threat of criminal charges faced by Fastow more than justifies the need for a stay of discovery against him.

D. The Hobson's Choice Faced By Fastow Is Not A Mere "Inconvenience" -- Without A Stay, Fastow Will Have To Choose Between His Fifth Amendment Rights And His Due Process Rights.

As Fastow explained in his opening motion, without a stay Fastow will have to choose between asserting his Fifth Amendment rights to protect himself against potential criminal charges and defending himself against the enormous monetary damage claims asserted by plaintiffs. *See* Fastow's Motion, at 1.

The *Newby* Lead Plaintiff attempts to characterize this choice as a mere "inconvenience," suggesting that discovery "will not prevent Mr. Fastow from assisting his attorneys in the defense of this litigation" and that, "by asserting his Fifth Amendment privilege, Mr. Fastow could actually hinder Lead Plaintiff's case against him. *Newby* Opp. at 11. No person subject to potential indictment would suggest that choosing between constitutional rights is merely inconvenient.

This argument is misleading at best (and disingenuous at worst). Fastow will gain no advantage in the civil litigation by asserting his Fifth Amendment privileges. Indeed, the *Newby* Lead Plaintiff will benefit from Fastow's assertion of the Fifth Amendment if a stay as to Fastow is not granted because the *Newby* Lead Plaintiff will be able to seek adverse inferences from each such assertion; the *Tittle* Plaintiffs admit they will seek the adverse inference. Fastow *wants* to answer the civil charges pending against him. He cannot effectively do that, however, until the criminal charges are resolved. It is for that reason that Fastow asks the Court for a temporary stay.

Nor, as the *Newby* Lead Plaintiff claims, could the harm Fastow will suffer without a stay be avoided by a protective order "prohibiting the use of Mr. Fastow's deposition answers, interrogatory responses and answers to requests for admission in any criminal proceeding." *Newby* Opp., at 12. Absent a grant of immunity from the prosecution, it is not clear the Court has the power to enter an order that would shield Fastow from prosecution from information gleaned during civil discovery; thus, there is no guarantee that such an order would be enforceable. Moreover, such an order would not prevent that information from being available

(directly or indirectly) to the Government in its criminal investigation, providing it with otherwise unavailable discovery to use to seek an indictment of Fastow. *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1903 ("The broad scope of civil discovery may present to [] the prosecution . . . an irresistible temptation to use that discovery to one's advantage in the criminal case").

E. Defendant Harrison's Objection To Fastow's Motion Does Not Provide A Basis For Denial Of The Motion.

According to defendant Harrison, the stay Fastow requests could prejudice other defendants (none of whom, except for Harrison, filed oppositions to the motion to stay) by forcing them to go to trial without deposing Fastow and could harm judicial efficiency by forcing other parties to "re-issue interrogatories or re-depose certain individuals in light of the testimony given by" Fastow. Defendant Ken Harrison's Opposition, at 4 [*hereinafter* "Harrison Opp."]. For these reasons, Harrison argues "[w]hen faced with a motion for stay by such a central figure, courts routinely *grant the stay as to all defendants . . . or deny it as to all defendants*." Harrison Opp., at 3 (internal citations omitted) (emphasis in original).

First, if the stay Fastow requests is not granted, Fastow may well have to assert his Fifth Amendment privilege in response to discovery concerning the transactions at issue in this litigation. In that event, defendant Harrison will not get any benefit from Fastow's deposition at this point *other* than an ability to ask at trial for an adverse inference in favor of Harrison from Fastow's assertion of privilege.

Second, none of the parties know how quickly the criminal case will be resolved or how much supplemental discovery would need to be taken if the stay were granted and then lifted before trial. The harms identified by Harrison are, therefore, speculative and cannot outweigh the real prejudice Fastow would suffer if his motion is denied.

Lastly, although Fastow has no objection to the Court staying all discovery, Fastow has not requested such a stay and does not believe that such a stay is required. Nor, for that matter,

has any party yet requested such a broad-based stay. If Defendant Harrison believes such a stay is appropriate, he should make the appropriate motion to the Court.

III. Conclusion

For all of the foregoing reasons, the Court should grant Fastow's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on **May 24, 2002** a true and correct copy of the above and foregoing instrument was served on all counsel of record in accordance with the Court's Order of April 10, 2002.

SEE ATTACHED SERVICE LIST

_____
Craig Smyser

EXHIBIT "A"
SERVICE LIST

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